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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 588.

C. E. RUSS,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

PETITION FOR REHEARING OF ORDER

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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Comes now your Petitioner, C. E. Russ, under and by authority of Rule 58 (2) of the Rules of the Supreme Court of the United States and respectfully petitions this Court for rehearing of the order entered on January 25, 1965 denying a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit in the above styled case on the ground that circumstances have intervened which are of substantial and controlling importance and effect.

STATEMENT OF GROUND IN SUPPORT OF PETITION.

The United States Court of Appeals for the Sixth Circuit found in the instant case (1) that although the proceedings before the National Railroad Adjustment Board are compulsory arbitration, the awards of the Board favorable to an employee are entirely reviewable on the merits by the federal courts, (2) that the Adjustment Board has no authority to fashion remedies or to make

awards binding on the railroad, though employees are always bound by adverse decisions, and (3) that in an enforcement suit on an award favorable to the employee, the federal district court will apply the law of master and servant as if a suit for wrongful discharge against the railroad were before it under the doctrine of *Moore v. Illinois Central R. Co.*, 312 U. S. 630 (1941). On this basis, the court below held that the discharge of your petitioner was not wrongful and that, therefore, the award of the Adjustment Board was arbitrary and unenforceable, in that it mitigated the discharge and prescribed in its award a lesser form of discipline.

On Petition for Writ of Certiorari, Petitioner asserted that this decision of the Court of Appeals for the Sixth Circuit involved important questions under the Railway Labor Act which have not been, but should be, settled by this Court, and that said decision conflicted with applicable decisions of this Court, particularly *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 373 U. S. 33 (1963), and *United Steel Workers v. Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The powers of the Adjustment Board, the nature and breadth of review of such awards by the federal courts, and the authority of the Board to fashion a remedy are involved in the questions submitted in the instant case and several other cases, which petitioner became cognizant of after filing the petition for certiorari in the instant case, and which have recently made or are making their way to this Court. For example, in *Brotherhood of Railroad Trainmen v. Louisville & Nashville R. Co.*, 334 F. 2d 79 (5th Cir. 1964), cert. den. 33 U. S. L. Week 3209 (U. S. Dec. 7, 1964), it was held that the reinstatement portion of a favorable Board award was not "final and binding" as a non-money award under Section 3, First (m) of

the Railway Labor Act. 45 U. S. C. 153, First (m). The court in that case found that an award of reinstatement and back pay is a money award. On summary judgment on the reinstatement portion of the award, it was concluded that the lower court had the power to review all the facts de novo and, further, on the basis of common law of master and servant found that the employee had not been wrongfully discharged. In *Gunther v. San Diego & Arizona Eastern Ry. Co.*, 336 F. 2d 543 (9th Cir. 1964), now pending on petition for writ of certiorari in this Court, the court below concluded that the Adjustment Board did not have authority to establish a three-physician panel to examine a locomotive engineer who had been terminated for alleged physical disability because the collective bargaining agreement did not contain such a provision. That court went on to hold that the Board exceeded its jurisdiction in ordering reinstatement of the employee upon the basis of the physicians' determination.

The number of cases seeking enforcement of Board awards has increased markedly since the decision in *Brotherhood of Locomotive Engineers v. Louisville & Nashville R. Co.*, 297 F. 2d 608 (6th Cir. 1961), aff'd 373 U. S. 33 (1963). But only in the instant case has a money award of the Board been found to be enforceable by a federal district court. The inability to obtain a court order enforcing an award favorable to the employee and the failure of the judicial opinions to provide any ground rules as to the requirements for the validity and enforceability of Board awards has caused great confusion as to the powers and authority of the Board and the enforceability of its decisions. It is apparent that only this Court can resolve this confusion.

It is also apparent that only this Court can determine whether the Adjustment Board will continue to be a viable

and useful body in the settlement of railroad labor disputes. As a result of the decisions in the aforementioned cases, the employee, except in those states which do not require exhaustion of administrative remedies, must submit his grievance to the Adjustment Board. *Transcontinental & Western Air, Inc. v. Koppal*, 345 U. S. 653 (1953). After several years, the employee may receive a decision from the Board. If this decision is adverse, he is prevented from seeking judicial review. If the decision is favorable, however, he must relitigate the matter in its entirety in the courts, where enforcement of such awards has been frustrated by the application of principles of contract law. Thus, the employee who has taken his case to a body allegedly possessing peculiar knowledge of collective bargaining agreements and labor relations in the railroad industry, is faced with a new trial in a forum which is unfamiliar with the intricacies of railroad labor disputes. The employee's favorable award from the Board is a hollow victory and is only the necessary vehicle to obtain a second trial on the merits. The employee traded his remedies outside the Railway Labor Act for a decision by a body of experts in this field. But it appears from the decisions which have been rendered in this area, he is not receiving his end of the bargain.

In *Republic Steel Corp. v. Maddox*, 33 U. S. L. Week 4181 (U. S. Jan. 25, 1965), which opinion was rendered after the petition for certiorari was filed in this case, this Court indicated that in the future a discharged railroad employee may not be entitled to pursue his remedy outside the Railway Labor Act seeking damages for wrongful discharge, in that disputes involving such employees would have to be submitted to the Adjustment Board even in states which do not have an exhaustion of administrative remedies rule. Although *Moore v. Illinois Central R. Co.*,

312 U. S. 630 (1941) was not overruled in the railway labor field, this Court indicated in Footnote No. 14 that consideration of such action should await a case presented under the Railway Labor Act in which the make-up of the Adjustment Board, the scope of review of monetary awards, the ability of the Board to grant remedies similar to those in court suits, and other features provided by the Act could properly be appraised. Thus, it appears that the exclusive remedy for settling labor disputes in the railroad industry will be one-sided compulsory arbitration by the Adjustment Board which does not appear to be the workable and binding statutory scheme as has been attributed.

Although a decision in the instant case would not normally lead to consideration of the advisability of continuing or discontinuing the *Moore* doctrine, it is only in a case, similar to the instant case, involving enforcement of a monetary award of the Board that the facts requisite for discussing the distinctive features of the administrative remedy would be presented. As previously noted, an appraisal of the make-up of the Board, the scope of judicial review, and the Board's authority to fashion remedies is required to answer the questions presented to this Court in the instant case. Petitioner believes that these features of the Adjustment Board can only be determined in their direct context as in the instant case.

This Court now has the opportunity to determine questions which it has itself raised by answering them in a case which may ultimately decide the effectiveness of the Adjustment Board in the disposition of grievances. In addition, the decision in this case may provide a solution to the unanswered question in the railroad industry as to whether the existing machinery for handling grievances provides an adequate outlet for the rank and file ferment

in the railroad industry, particularly since the use of economic strength to enforce a favorable Board award has been eliminated. With the seeming impossibility of enforcing a favorable Board award, the worker who believes that he is already a forgotten man at the bargaining table cannot be made to believe that his dispute can be democratically handled through the administrative procedures provided him. It is inconceivable that if the Adjustment Board is the exclusive forum, and if judicial review is as broad as interpreted by the Court of Appeals in the instant case, the tensions of railroad employees can be diffused adequately by the employment of these procedures in all "minor" labor disputes in the railroad industry.

It is respectfully submitted that this Court should resolve the confusion existing in regard to these issues of major and pressing importance by granting the Petition for Writ of Certiorari in the instant case.

Respectfully submitted,

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CERTIFICATE UNDER RULE 58 (2).

I, Harold A. Ross, one of the attorneys of record for Petitioner, do hereby certify that the above and foregoing petition for rehearing is presented in good faith and not for delay and that the same is restricted to the ground that circumstances have intervened which are of substantial and controlling effect.

HAROLD A. ROSS,
One of the Attorneys for Petitioner.